

IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CASE NUMBER DA-10-0068

JOAN Y. CLARK and VICTORIA LYNNE SMITH,

Plaintiffs and Appellees,

v.

ROBERT ROY PENNOCK, MARILYN FROST,
formerly known as MARILYN PENNOCK,
DONALD R. BERNARD, ELIZABETH P.
BERNARD, and JAMES C. KOCH AND
THOMAS A. KOCH,

Defendants and Appellants.

APPELLEES' BRIEF

On Appeal from the District Court of the Fifth Judicial District of the
State of Montana, in and for the County of Jefferson,
The Honorable Loren Tucker, Presiding

APPEARANCES:

James A. McLean
Drysdale, McLean & Willett, PLLP
2066 Stadium Drive, Suite 101
Bozeman, Montana 59715
jam@dmwlawmt.com
(406) 582-0027
(406) 582-0028 FAX

Counsel for Plaintiffs and Appellees

Alanah Griffith
Pape & Griffith, P.C.
1184 N. 15th, Ste. 104
Bozeman, Montana 59715
alanah@papegriffithlaw.com
(406) 522-0014
(406) 585-2633 FAX

Counsel for Defendants and
Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
STANDARD OF REVIEW	12
SUMMARY OF THE ARGUMENT	16
ARGUMENT	18
I. Whether the District Court’s Findings of Fact are supported by substantial credible evidence when reviewed in a light most favorable to the Plaintiffs, the prevailing party in this case? Are the Findings clearly erroneous? Whether the District Court correctly applied the law to the facts?	18
a. Did the District Court err when it Denied Summary Judgment in Favor of Frost, the Bernards and the Koches?	18
b. Did the District Court err when it concluded Smith and Clark have an easement over Scenic Drive because it is more reasonable and convenient than the easement used by Smith and Clark and their predecessors in interest for over twenty years?	33
c. Did the District Court err when it allowed Dave Albert, a surveyor to testify about septic regulations?	37
d. Did the District Court err when it concluded that Mrs. Frost’s gate must be removed?	38

APPELLANT’S REQUEST FOR RELIEF	39
CERTIFICATE OF COMPLIANCE	40
CERTIFICATE OF SERVICE	41

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page No.</u>
<i>Carelli v. Hall</i> , 279 Mont. 202, 926 P.2d 756 (1996)	14, 15
<i>Combs-DeMaio Living Trust v. Kilby Butte Colony, Inc.</i> , 2005 MT 71, 326 Mont. 334, 109 P.3d 252	13
<i>DeNiro v. Gasvoda</i> , 1999 MT 129, 294 Mont. 478, 982 P.2d 1002	12,13
<i>Erker v. Kester</i> , 1999 MT 231, 296 Mont. 123, 988 P.2d 1221	16
<i>Guthrie v. Hardy</i> , 2001 MT 122, 305 Mont. 367, 28 P.3d 467	15
<i>Halverson v. Turner</i> , 268 Mont. 168, 885 P.2d 1285 (1994)	36
<i>Harland v. Anderson Ranch Co.</i> , 2004 MT 132, 321 Mont. 338, 92 P.3d 1160	36
<i>In re Marriage of Mease</i> , 2004 MT 59, 320 Mont. 299, 92 P.3d 1148	14
<i>In re Water Complaint of Kelly</i> , 2010 MT 14, 355 Mont. 86, 244 P. 3d	12
<i>Klawitter v. Dettmann</i> , 268 Mont. 275, 886 P.2d 416 (1994)	14
<i>Leisz v. Avista Corp.</i> , 2010 WL 1858483 (2010)	36

<i>Luppold v. Lewis</i> , 172 Mont. 280, 563 P.2d 538 (1977)	12
<i>Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc.</i> , 2007 MT 159, 338 Mont. 41, 164 P.3d 851	13, 14
<i>Mason v. Garrison</i> , 2000 MT 78, 299 Mont. 142, 998 P.2d 531, 57 St. Rep. 340 ..	15, 34, 35, 36
<i>Mularoni v. Bing</i> , 2001 MT 215, 306 Mont. 405, 34 P.3d 497	13
<i>Ophus v. Fritz</i> , 2000 MT 251, 301 Mont. 447, 11 P.3d 1192	13, 14
<i>Renner v. Nemitz</i> , 2001 MT 202, 306 Mont. 292, 33 P.3d 255	36
<i>SVKV, L.L.C. v. Harding</i> , 2006 MT 297, 334 Mont. 395, 148 P.3d 584	13
<i>Strahan v. Bush</i> , 237 Mont. 265, 773 P.2d 718, 46 St. Rep. 789 (1989)	15
<i>Watson v. Dundas</i> , 2006 MT 104, 332 Mont. 164, 136 P.3d 973	16
<u>Statutes:</u>	
§ 28-3-301, MCA	15
§ 70-1-513, MCA	13
§ 70-1-516, MCA	15, 27, 36, 37, 39
§ 70-17-106, MCA	13, 14

Rules:

Rule 11(4)(a), M.R.App.P.	40
--------------------------------	----

Other Authority:

The Law of Easements and Licenses in Land

Jon W. Bruce and James W. Ely, Jr.	15, 16, 37
---	------------

STATEMENT OF THE ISSUES

I.

Whether the District Court's Findings of Fact are supported by substantial credible evidence when reviewed in a light most favorable to the Plaintiffs, the prevailing party in this case? Are the Findings clearly erroneous? Whether the District Court correctly applied the law to the facts?

- a. Did the District Court err when it Denied Summary Judgment in Favor of Frost, the Bernards and the Koches?
- b. Did the District Court err when it concluded Smith and Clark have an easement over Scenic Drive because it is more reasonable and convenient than the easement used by Smith and Clark and their predecessors in interest for over twenty years?
- c. Did the District Court err when it allowed Dave Albert, a surveyor to testify about septic regulations?
- d. Did the District Court err when it concluded that Mrs. Frost's gate must be removed?

STATEMENT OF THE CASE

The Appellees, Joan Y. Clark and Victoria Lynne Smith (herein collectively as "Clark"), brought an action against their neighbors, the Appellants Marilyn Frost, Donald R. And Elizabeth P. Bernard, and Donald A. Koch (herein collectively as "Frost"), requesting a Declaration that Clark had an easement on a road known as Scenic Drive across their neighbor's property for access to Clark's

property, Tract 15. Clark requested that the court enjoin Frost from blocking or denying them access to their property and that the court order the removal of a gate across the road. Clark further asked for attorneys fees for enforcement of the covenants. Both parties requested a Summary Judgment. Both requests for Summary Judgment were orally denied by the court.

After a bench trial, the district court entered Judgment in favor of Clark, holding that they have an easement for ingress and egress to their property created by the Deeds of Conveyance and Covenants for ingress and egress from and to their property, which includes the right of access over Frost's property from both Scenic Drive and Prospectors Loop. The court enjoined Frost from interfering with, obstructing or blocking access over Scenic Drive and ingress and egress from Tract 15. The court also awarded attorneys fees and costs to Clark. The parties stipulated to the amount of the attorneys fees and costs. Frost appealed the Judgment, including the award of attorneys fees and costs.

STATEMENT OF THE FACTS

Frost's Statement of Facts setting forth the history of Pipestone Tracts, the relevant provisions of the granting deeds, and chain of title and relevant portions of the covenants up through the first full sentence on page 14 are incorporated into the Clark's Statement of the Facts.

Clark submit the following additional Statements of the Facts supporting the district court's Findings and Conclusions:

1. Paragraph 16 of the Covenants provides:

No amendment of these covenants may diminish a Tract owner's right of ingress and egress, set forth herein. Exhibit 4, page 7.

2. Paragraph 9 of the Covenants provide that:

"... no more than two residences and accompanying outbuildings may be allowed per twenty acres. ... Each residence may also have a guest house." Exhibit 4 page 6:

3. Paragraph 17 of the Covenants provides:

In any action of any kind for the enforcement of these covenants, conditions and restrictions, if the relief prayed for is granted in whole or in part, the applicant for relief shall be entitled to recover necessary court costs of the action, including attorney's fees. Exhibit 4, page 8.

4. The parties do not dispute that Clark has access to Tract 15 over Prospectors Loop on the west side of their property. The parties agree that there is no prescriptive easement or easement by necessity issues in this case. Pre-Trial Order, Agreed Statement of Facts, page 8.

5. Dave Albert, YBP's surveyor who designed the Pipestone Tracts with building sites accessed by the road system, testified that it was his understanding that YBP constructed Scenic Drive and extended the construction to the cul-de-sac to provide access to the building sites on Tract 15 and Tract 16. Tr. pg. 186, lines

18-25; pg. 187, lines 1-18.

6. Wayne Joyner indicated in his testimony that he expected that the road builders would terminate Scenic Drive just past the south end of tract 12 at the end of the dashed lines in Tract 13. He stated that he was aware that Scenic Drive was constructed beyond the dashed lines to the cul-de-sac, and that he did not specifically know whether the road was extended and constructed by the YBP road builders to the cul-de-sac. Tr. pg. 290, lines 3-25; pg. 291, lines 1-4.

7. Marilyn Frost testified that she understood that the extended road was constructed by the owner of Tract 13 because she saw his camper parked on the cul-de-sac when they were out visiting their property. Tr. pg. 244, lines 1-4; pg. 257, lines 4-25; pg. 258. She also testified at the trial that when she purchased the property, Scenic Drive was built and terminated just past Tract 12 and into Tract 13. Tr. pg. 242, lines 10-19; pg. 243, lines 15-25. She purchased the property in September of 1987. (Exhibit 11) Her testimony in this regard was in total conflict with her sworn and signed affidavit under oath dated August 11, 2008 submitted to the Court as factual statements in support of her Motion for Summary Judgment. (Exhibit 36) Mrs. Frost stated in her affidavit:

"When we purchased Tract 11, the roads did not exist on our property."

"As promised YBP built the road in 1988."

(Exhibit 39)

14. Mrs. Frost's testimony at trial in this regard was also contrary to the position of the Defendants in their contentions set forth in the Pretrial Order. Frost, Bernard and Koch state in number 7 of their contentions that

"YBP continued the driveway into Tract 12 as a convenience to the future owner. This construction was not an extension of the 60' easement, but a private driveway."

15. During cross examination of Mrs. Frost by Mr. McLean, Mrs. Frost indicated that when she purchased Tract 11, there was a roughed-in trail down to the end of Tract 12 and not an improved road. Tr. pg. 253, lines 18-25. Mr. Joyner testified that before the road known as Scenic Drive was constructed, there was an existing trail there already. Tr. pg. 277, lines 1-7. This indicates that the road was constructed later, consistent with Mrs. Frost's Affidavit.

16. Mr. Joyner testified that he left the YBP in January of 1988 and started his own company and took the road builder with him. Tr. pg. 270, lines 10-12; pg. 289, lines 7-10; p. 291, lines 4-6.

17. Frost and Clark engaged surveyors to make a determination of whether the Clark Tract 15 was within 30 feet of the centerline of Scenic Drive as constructed.

18. Frost contended that even if Clark has access over Scenic Drive, Plaintiffs cannot access their Tract 15 because their surveyor's measurements (Matthew

Mayberry) show the east boundary line of their Tract is not within 30 feet of the centerline of the constructed road at any point. Frost's Exhibit A-1. Mr. Mayberry testified that although he viewed Scenic Drive, he was not present when the survey was done, did not draw the survey exhibit, but placed his stamp thereon. He testified that Frost's survey Exhibit A-1 was not the final survey and that it contained a number of mistakes and comments as to the issues before the Court. Tr. pgs. 211, 212 and 213, lines 1-7; pgs. 216 through 223. He testified that the methodology used in determining the center line was to take GPS readings by walking down the edge of the traveled way on one side of the road and doing the same thing by walking down the traveled way on the other side of the road. Tr. pgs. 213-215. Mr. Mayberry testified that his survey Exhibit A-1 showed that the western edge of the easement was 3 inches off the easterly line of Tract 15 and that the easement never went into Tract 15. Tr. pg. 223, lines 19-25; pg. 224, pg. 225, lines 1-2. However, Frost's exhibit indicates that the center line was determined by measuring from the edge of the "Gravel." (Frost's Exhibit A-1) The testimony and the exhibit pictures were clear that there was not gravel on the road. Tr. pg. 226, lines 12-25; pgs. 227 and 228.

19. Mr. Mclean objected to the introduction of Frost's Exhibit A-1 based upon his voir dire and the Court admitted the Exhibit stating that the objection goes to

the weight of it rather than to its admissibility. Tr. pgs. 218 - 223.

20. Mr. Mayberry's testimony as to how he determined the center line of the road was vague and unclear and his degree of accuracy in determining the center line of the road could be off by one-half of a foot to a foot. Tr. pgs. 226 - 231; pg. 232, lines 1-25.

21. Dave Albert explained in detail his methodology in locating the center line of the road. He located the shoulders by observation of the road construction and by the location of the more defined shoulders in the road and over the culvert that was installed under the road. He and his helper adjust variance in the shoulder location by lining up the shoulders where they were more obvious, including the more defined culvert shoulders. He took GPS readings at various points along the located shoulders and located center line and then platted them and the center line of the road way on the survey exhibit submitted to the Court. (Exhibit 19)

According to Dave Albert, his measurements show the east line of Tract is within 30 feet of the centerline of Scenic Drive along the southerly 230 feet of Scenic Drive as constructed to the southwest corner of Tract 13. Exhibit 19; Tr. pg. 163; pgs. 168 - 176.

22. Dave Albert's survey also shows his determination of the center line of the traveled way of the road actually being closer to Tract 15 than his shoulder

measurements. Exhibit 19.

23. Dave Albert was the surveyor for Yellowstone Basin Property (herein “YBP”) and designed the tracts and road system for Pipestone Tracts, testified as follows.

24. Mr. Albert’s experience in design of subdivision duties included configuration of roads that would provide access to the parcels within the subdivisions. Tr. pg. 140, lines 12-23.

26. Mr. Albert, while working for YBP, designed positions of roads that allowed access to parcels and building sites. Tr. pg. 141, lines -15; pg. 146, lines 5-13; pg. 144, lines 1-15. He drafted Exhibits A-1, A-2 and A-3 for YBP which were attached to the Covenants. Tr. pg. 145, lines 8-23. Exhibit 4 and Exhibit 17.

26. The dashed lines represented the access roads that YBP intended to construct as access to all the lots or building sites on the lots. Tr. pg. 145, lines 24-25; Tr. pg. 146, lines 1-4.

27. Mr. Albert testified that the reason for the dashed lines was to show approximately the general location of where the road system would be built. Tr. pg. 147, lines 7-25; Tr. pg. 148, lines 1-2. The dashed lines were labeled as approximate only on Exhibits A-1 through A-5. Mr. Albert stated that the actual location of the access roads was determined as follows: The Covenants refer to

access along the roads as built, so where the roads actually got built, became the center line of the easements, that provided access across other people's property to the area, to an area near every tract. Tr. pg. 148, lines 3-25.

28. Mr. Albert stated that as set forth in the Covenants, when the roads actually got built, the center line of the road easement became the center line of the road as built. The roads were not surveyed. The road system provided access across other people's property to every tract. Tr. pg. 148, lines 3-25; Tr. pg. 149, lines 1-25.

29. The roads were constructed after pins were set marking each tract's boundaries. The road builder was told to build the roads in the approximate location of the dashed lines to get across to the lots. He was given a map (similar to A-1 to A-3) Tr. pg. 150; lines 1-5.

30. Mr. Albert pointed out on Exhibit 17 several roads that were constructed by YBP and deviated substantially from the dashed lines. Tr. pg. 153, line 25; Tr. pg. 154; Tr. pg. 155; Tr. pg. 156, lines 1-17. The road at issue in this case, Scenic Drive, was constructed past the dashed lines, ending at the southwest line of Tract 12, all the way to the Southwest line of Tract 13. Tr. pg. 155, lines 6-11.

31. Dave Albert designed Scenic Drive to provide access to the building sites near the east side of Tracts 14, 15 and 16 because the western parts of these lots are nearly unbuildable. Tr. pg. 156, lines 18-25; Tr. pg. 157, lines 1-13. Also see

Clark's testimony describing the topography of the east side of Tract 15. Tr. pg. 97, lines 22-25, Tr. pg. 98. Exhibit No. 20 (admitted at Tr. pg. 106) and Exhibit No. 21 (admitted at Tr. pg. 104).

32. Mr. Albert describes the topography of the Clark Tract 15 and the unbuildable westerly two-thirds of the lot as follows: Raders Creek is on the western boundary of Tract 15 which rises sharply to the east and is covered with large boulders. It has over a 20% grade, pushing 30% in some places. Tr. pg. 157, lines 11-24.

33. He further states that there is hardly any room to build a building on Tract 15 and he does not think that there is any way to put in a normal drain field and septic system as one has to be 100 feet away from the creek and be on less than a 15% slope. Tr. pg. 158; Tr. pg. 159; Tr. pg. 160, lines 1-3.

34. Mr. Albert noted that if he would have been told that Tract 15 and adjacent lots were not to have access over Scenic Drive, he would have made a note in the Covenants and documented the lack of access so future buyers of Tracts 14, 15 and 16 would know they did not have access to their tracts along Scenic Drive and to protect his employer's interest from liability. Tr. pg. 183, lines 15-25; Tr. pg. 184; Tr. pg. 185; Tr. pg. 188, lines 24-25; Tr. pg. 189.

35. Mr. Albert was never told by anybody from YBP, including Wayne Joyner, that Scenic Drive was not to access Tract 15 or to the tract north of it (Tract 14). Such limitation of access to these lots would be contrary to the plan he devised for these lots, the roads and access to the building sites on the east side of these Tracts. Tr. pg. 183, lines 14-25; Tr. pg. 184; Tr. pg. 185.

36. Mr. Albert further testified that it was the habit of YBP and the road builders to construct roads to the tracts all at one time for efficiency purposes. Tr. pg. 187, lines 5-18.

37. The pertinent parts of the testimony of Wayne Joyner, one of the owners of Yellowstone Basin Property who was initially involved in the management and sales of Pipestone Tracts, is as follows:

38. Mr. Joyner was actively involved in laying out the Pipestone Tracts, laying out the phases and the roads, and drafting the Deeds and Covenants. Tr. pgs. 270-273; Tr. pgs. 278-280. He testified that he priced certain lots purposely low to bring sales volumes up and he said he set up the road system so that they would have access along the drainage and not from behind. He identified these lots as 14, 15, 16, 17, 18 and 19. Tr. pg. 272, lines 21-25; Tr. pg. 273; Tr. pg. 274, lines 1-13. However, he never told his salesmen about this. Tr. pg. 274, lines 8-13.

39. Mr. Joyner admitted that looking at the documents for Pipestone Tracts (Deeds and Covenants), a potential buyer of Tract 15 would not know that access was limited to Prospector's Loop. Tr. pg. 291, lines 10-16; Tr. pg. 293, lines 18-25; Tr. pg. 294. In discussing the language of the original YBP deeds granting a general non-exclusive 60-foot wide easement for ingress to and egress from a particular tract across other tracts, Mr. Joyner stated that "non-exclusive to me meant it was available for the use of all our customers." Tr. pg. 292, lines 1-12.

40. He admits that if Scenic Drive as constructed touches Tract 15 within 30 feet of the center line of the Tract would have access over Scenic Drive. Tr. pg. 293, lines 9-17.

STANDARD OF REVIEW

The Montana Supreme Court reviews the Findings of fact in a civil bench trial to determine whether they are supported by substantial credible evidence. They review such evidence in a light most favorable to the prevailing party, and leave the credibility of witnesses and weight assigned to their testimony to the determination of the district court. *In re Water Complaint of Kelly*, 2010 MT 14, ¶ 25, 355 Mont. 86, 224 P.3d 640, citing *Luppold v. Lewis*, 172 Mont. 280, 284, 563 P.2d 538, 540-41 (1977). The Court reviews a district court's Conclusions of Law in this context for correctness. *Kelly*, citing *DeNiro v. Gasvoda*, 1999 MT 129, ¶

9, 294 Mont. 478, 982 P.2d 1002.

The Court does not reweigh the evidence presented nor do they judge the credibility of the witnesses, nor do they review the evidence to determine if it supports a different decision than that reached by the court. *Combs-DeMaio Living Trust v. Kilby Butte Colony, Inc.*, 2005 MT 71, ¶ 9, 326 Mont. 334, 109 P.3d 252.

The breadth and scope of an easement are determined by the actual terms of the grant. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc.*, 2007 MT 159, ¶ 18, 338 Mont. 41, ¶ 18, 164 P.3d 851, ¶ 18; *see also* § 70-17-106, MCA. When interpreting deeds, the rules of contract interpretation govern. *See* § 70-1-513, M.C.A. (“Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this part.”); *Mularoni v. Bing*, 2001 MT 215, ¶ 32, 306 Mont. 405, ¶ 32, 34 P.3d 497, ¶ 32 (“In interpreting the meaning of an easement grant, contract principles apply.”). “The construction and interpretation of a contract is a question of law.” *Cenex*, ¶ 19, *citing Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, ¶ 19, 11 P.3d 1192, ¶ 19. “Likewise, whether an ambiguity exists in a contract is a question of law.” *Cenex*, ¶ 19, *citing Mularoni*, ¶ 32; *SVKV, L.L.C. v. Harding*, 2006 MT 297, ¶ 43, 334 Mont. 395, ¶ 43, 148 P.3d 584, ¶ 43. If the language of a contract is

unambiguous – i.e., reasonably susceptible to only one construction – the duty of the court is to apply the language as written. *Cenex*, ¶ 19, citing *Ophus*, ¶ 32; *Carelli v. Hall* (1996), 279 Mont. 202, 209, 926 P.2d 756, 761. “However, if the language of a contract is ambiguous, a factual determination must be made as to the parties’ intent in entering into the contract.” *Cenex*, ¶ 19, citing *In re Marriage of Mease*, 2004 MT 59, ¶ 30, 320 Mont. 229, ¶ 30, 92 P.3d 1148, ¶ 30; *Klawitter v. Dettmann* (1994), 268 Mont. 275, 281, 886 P.2d 416, 420. Therefore, the court may look at the “circumstances under which [an instrument] was made, including the situation of the subject of the instrument and of the parties to it,” in making a preliminary determination whether the instrument contains an ambiguity. *Cenex*, ¶ 53.

Section 70-17-106, MCA, holds:

The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired.

When an easement is specific in nature, the breadth and scope of the easement are strictly determined by the actual terms of the grant. However, when the granting language is not specific in nature, courts must look beyond the plain language of the grant to whether the easement is reasonably necessary and convenient for the purpose for which it was created, with a view to the situation of

the property and the surrounding circumstances. *Mason v. Garrison*, 2000 MT 78, 299 M 142, 998 P2d 531, 57 St. Rep. 340 (2000), followed in *Guthrie v. Hardy*, 2001 MT 122, 305 M 367, 28 P3d 467 (2001). See also *Strahan v. Bush*, 237 M 265, 773 P2d 718, 46 St. Rep. 789 (1989).

The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. See § 28-3-401, MCA.

Where the language of an agreement is clear and unambiguous, the duty of the court is to apply the language as written. *Carelli v. Hall*, (1996), 279 Mont. 202, 209, 926 P.2d 756, 761.

The same principles are applied in determining the meaning of an easement grant.

Section 70-1-516, MCA, states:

A grant is to be interpreted in favor of the grantee, except that a reservation in any grant and every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor.

Courts commonly resolve ambiguities by construing the easement document in favor of the grantee. The Law of Easements and Licences in Land, Jon W. Bruce and James W. Ely, Jr. Sec 8:2 p 8-5 to 8-6.

Despite the professed emphasis on the binding effect of precise language, the parties are deemed to have contemplated the easement holders right to do

whatever is necessary in order to enjoy fully the purposes for which the easement was granted. What constitutes reasonable usage is a question of fact. Courts consider the location and uses of the dominate and the servient estate as well as the relative advantage or disadvantage to the parties caused by the usage.” *Id.*

Section 8:3 P 8-12.

Applying general principles of contract law and interpreting the easement in favor of grantee Watson, the court noted that under 1-3-213, one who grants a thing is presumed to also grant whatever is essential to its use.

Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006), following *Erker v. Kester*, 1999 MT 231, 296 M 123, 988 P2d 1221 (1999).

SUMMARY OF THE ARGUMENT

(It would be helpful to the Court to have Exhibit 18 in front of them to assist in reviewing this summary)

Clark has an easement created by the Deeds of Conveyance and the Covenants on the Pipestone Tracts road system constructed by the Developer, Yellowstone Basin Properties, Inc. (YBP) for ingress and egress from their Tract 15. Clark’s easement for ingress and egress to their Tract 15 includes the right of access from and off of both Prospector’s Loop and Scenic Drive, including access on Scenic Drive as constructed to the southwest corner of Tract 13 across the Frost

properties.

Frost disagrees and contends that Scenic Drive, which crosses their properties, was not intended as an access to Clark's Tract 15, and that the Covenants limit access over the road system, including Scenic Drive, unless a tract touches the road within 30 feet of the center line of the road, and that Scenic Drive terminates at the end of the dashed lines in Tract 12 as shown on Exhibit A-1 attached to the Covenants. They contend that Clark does not have access off of Scenic Drive to their tract because the east boundary line of Tract 15 is not within 30 feet of the center line of Scenic Drive as constructed by YBP.

Scenic Drive was actually constructed past the south line of Tract 12 to the southwest corner of Tract 13 where the east boundary line of Tract 15 comes within 30 feet of the center line of the road, for approximately 230 feet. The parties disagree whether the extension of the road was constructed by YBP or someone else.

Clark contends that they have access off of Scenic Drive to their Tract 15 at any point across Tract 12 or Tract 13 regardless of whether their boundary line is within 30 feet of the center line of Scenic Drive because of the granting language in the deeds and Covenants and the facts and circumstances under which the granting language was made.

ARGUMENT

- I. WHETHER THE DISTRICT COURT’S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE WHEN REVIEWED IN A LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THE PREVAILING PARTY IN THIS CASE? ARE THE FINDINGS FINDINGS CLEARLY ERRONEOUS? WHETHER THE DISTRICT COURT CORRECTLY APPLIED THE LAW TO THE FACTS?**
- a. DID THE DISTRICT COURT ERR WHEN IT DENIED SUMMARY JUDGMENT IN FAVOR OF FROST, THE BERNARDS AND THE KOCHES?**

Frost argues that the district court should have granted summary judgment to Frost because the conveying language clearly and unambiguously limited grantees access to the roads as built by developer and Scenic Drive as built by developer does not touch Tract 15.

The district court concluded that “Clark and Smith have an easement created the deeds of conveyance and the covenants on the Pipestone Tracts road system constructed by the developer, Yellowstone Basin Properties, Inc., for ingress to and egress from Tract 15 and that “Clark and Smith’s easement for ingress and egress to Tract 15 includes the rights of access from both Prospector Loop and Scenic Drive.”

The district court found that there was ambiguous language in the deeds and Covenants regarding access to the building sites because the determining terms are “appropriate” and “as built.” (Conclusion of Law No. 5)

The district court's interpretation of the granting language in the deeds of conveyance and in the covenants is supported by the fact and circumstances and its analysis of the language contained therein and applying the applicable law thereto.

The deeds from YBP in all the parties' chain of title granted to the purchasers a general non-exclusive sixty foot (60') easement for ingress to and egress from the purchasers tract and a general easement for public utilities across the other tracts described in the survey. The deeds also excepted and reserved unto YBP and its successors and assigns the same general non-exclusive sixty foot easement and a general easement for utilities across each tract. Clark is a successor in interest of YBP and acquires the same easement rights as reserved by YBP.

The Covenants further confirmed that each tract owner will have the right of ingress and egress on the road system from the county road to his property.

(Exhibit 4 Paragraph 7)

Frost contend that Scenic Drive is the exclusive and private access easement to their Tracts only. The deeds to Clark's Frost's Tracts reserve and convey a general *non-exclusive* easement to each Tract. There is nothing in the deeds to the Tracts or in the Covenants which indicate that Defendants have the exclusive right

to use Scenic Drive for access to their Tracts.

The court correctly found that Clark was granted (and succeeded to YBP's reservation of) a general non-exclusive sixty foot (60') easement for ingress to and egress from Tract 15 over the road system across other tracts. *This would include Scenic Drive.* Frost was also granted the same easement. It was a non-exclusive easement meaning that the easement over the road system was not exclusive to any party. Wayne Joyner testified that the reference in the granting deeds to the word "exclusive" meant to him that the road system was available for the use of all his customers. Therefore Clark has the right to use the Scenic Drive road for access to her Tract 15 as well as Prospector's Loop.

The next issue was is whether Clark's easement for ingress to and egress from their Tract 15 over the road system is limited to access off of Prospectors Loop by the deeds in her chain of title or by the covenants or map exhibits, and whether Clark is prohibited by the deeds and covenants or map exhibits from using Scenic Drive to access her building sites on the east side of their Tract 15.

The deeds in the chain of title provide that the location of the road system providing ingress and egress are set forth and governed by the Covenants and exhibits thereto. The deeds and covenants further provide that the location of the road easements shall be thirty feet (30') on each side of the center line of the roads

system to be constructed by Grantor (YBP). These provisions appear to refer to the main road system constructed by YBP. There do not appear to be any provisions as to the location, limitations or width of the access roads to be constructed by a tract owner off of the main road system to their respective tracts.

Paragraph 7 of the Covenants and the attached maps, exhibits A-1 through A-5 , addresses the approximate location of the main road system and the ingress and egress rights of each tract owner to and from his or her tract on said road system. The location of the road system is defined as:

“The road easement shall be 30 feet on each side of the centerline of the road system to be constructed by Declarant on said property during the calender years 1987, 1988, and 1989, along the approximate routes set forth in the attached Exhibits A-1, A-2, A-3, A-4 and A-5 . . .”

The access to a Tract is defined as

*“. . . each tract owner will have the right of ingress and egress on said road system from the county road **to his property.**”* (Emphasis added)

The plain meaning of this language is that a tract owner has the right to use the main road system to access his or her property across the other tracts, including building an access road off of the main road system to his or her tract, even if it is not within 30 feet of the center line of the main road!

The only limitation on the use of roads set forth in the Covenants is a limitation on the use of old roads:

“Because of the many “old” roads in the area, all Tract owners agree to be limited to the roads set forth as dotted lines or continuous lines on the attached Exhibits. . . . “All existing roads with the Pipestone Surveys not shown on the attached Exhibits are not to be used by the Tract Owners for ingress and egress, unless such road use is with the permission of the Tract owner.”

This limitation is not applicable to the access off of Scenic Drive to Tract 15 as Clark is not trying to use an old or existing road not shown in the Exhibits to access their Tract 15. They would be using Scenic Drive to access their Tract 15.

Both Wayne Joyner and Dave Albert testified that the approximate location of the unbuilt road system was shown on said Exhibits as dashed or dotted lines. Both testified that the actual location of the road system was 30 feet on each side of the center line of the road system as actually built.

Dave Albert testified to and drew on the combined map of Pipestone Tracts (Exhibit 17) several locations where the actual road was constructed by YBP at a location outside the dotted or dashed lines showing the approximate location of the roads on the Exhibits. One of the locations he marked on the map of a road that was constructed outside of the dashed lines was the extension of Scenic Drive from the South side of Tract 12 to the cul-de-sac at the bottom of Tract 13.

By reason of the foregoing, the court did not agree with the Frost’s position that the location of the dashed lines limits access to a tract. The court found that

the covenants and attached map exhibits approximately locate the main road system, and that the main road system is located 30 feet on each side of the center line of the road as constructed by YBP. The Covenants and map exhibits do not state or indicate where the places of access to a tract are located off the main road system. An example, besides Tracts 14 and 15, of a Tract which does not appear to be touched by the dashed lines is Tract 49.

There does not appear to be any provisions in the Covenants limiting a tract owner to one access to a tract off of the road system. Several tracts appear to have more than one access available over the road system. For example the Bernard Tract 7 and Tract 8, Tract 49, Tract 14, and Clark's Tract 15. Exhibit 17.

Albert testified that he designed and surveyed the tracts as an employee of YBP, to provide a building sites for each tract with access over the road system to the building sites to each tract, including Tract 15. He testified that the way he designed the tracts and building sites, Scenic Drive was part of the YBP road system that provided access to the building sites on the east side of Tract 15, 14 and 16. He testified that helped design the road system to provide access off of the main road system to the building sites on each tract . Mr. Joyner did not dispute Mr. Albert in this regard.

Dave Albert testified that there were no reasonable building sites on the lower two thirds of the west side of Tract 15, because of the steep terrain, large rocks, and inability to install a septic tank drain field because the slope exceeded the 20% legal standards required for a drain field. Joan Clark confirmed the fact that there were no building sites on the west side of Tract 15 in her testimony. This testimony was not disputed.

Albert testified that he was also concerned with the difficulty of installing a drain field on the west side of Tract 15 which would be required by legal health regulations to be located more than 100 feet from the creek on the west side of Tract 15. He took these factors into consideration when he designed the tracts to each have a building site. He would have redesigned the configuration of the tracts if he would have been made aware by YBP and Wayne Joyner that access was not to be available off of the Scenic Drive road to the building sites located on Tract 15 and Tract 14 and Tract 16. It was his understanding that Scenic Drive was extended and constructed by YBP past the dashed line to the cul-de-sac at the southwest corner of Tract 13 to provide access to these sites. He testified that he was not made aware by YBP that the access to Tract 15 was to be limited to Prospectors Loop. He further testified that if he was made aware that access was to Tract 15 (or 14 and 16) was to be limited to Prospectors Loop, he would have

required on inserting this limitation in the covenants and on the map exhibits to protect YBP and himself from legal claims. He would have further had the Scenic Drive constructed further away from Tracts 14, 15 and 16 to clearly indicate to a buyer of these tracts that access was not available off of Scenic Drive.

Wayne Joyner testified that he intended to limit access to several tracts along the drainage through which Prospectors Loop runs (Tracts 9 through 19) to the road along the west side (Prospectors Loop) and did not intend for these tracts to have access over Scenic Drive, because he wanted to price these tracts cheaper so he could generate sales to bring the sales volumes up to satisfy the new owners of the company. However, he admitted that he never told anyone of this intent, including the salesmen. He does not recall telling any of the potential purchasers, including Mrs. Frost that access over Scenic Drive was not available for Tract 15 and the other tracts along the drainage. Joyner admitted that his intent to limit access to Tract 15 (and other tracts) to Prospectors Loop was not incorporated or evident in the deeds and the covenants. He admitted that there was no language in the deeds or in the covenants which specifically restricted access to Tract 15 or other adjoining tracts over Scenic Drive. He testified that even if YBP explained the limitation of access over Scenic Drive to their Buyers the next generation buyer would not know that. He was aware that the

constructed road was very close to these tracts (within inches) and that it was not his intent to have it that way, but that is the way it turned out. It was his opinion that if a tract is located within 30 feet of either side of the center line of the constructed road it provides access to that tract.

Joan Clark testified that when she purchased Tract 15 she relied on the deed language and the covenants to confirm she had access to her building sites on the West portion of her Tract 15.

The district court found it incredible that YBP would limit access to building sites on a tract, just to make sales of cheaper tracts. There was no notice apparent in the deeds, covenants or exhibits to subsequent purchasers of Tract 15 or the other adjacent tracts that they were prohibited from using Scenic Drive to assess their tracts.

The district court's conclusions are based upon a reasonable interpretation of the language in the deeds, covenants, and upon the testimony given in this regard.

In addressing the issue of whether access to a tract is not available if the boundary line of a tract is not within 30 feet of the center line of the road system constructed by YBP, both the deeds from YBP to the purchaser and the Covenants clearly grant a right of ingress and egress on the road system from the county road

to the tract across the other tracts. The location of the access roads to a tract off of the main road system is not addressed in the deeds or the Covenants or map exhibits thereto. The tract owner's right of access off of the main road system to his or her tract over another owner's tract may be somewhat ambiguous. However, the court may resolve the ambiguity by construing the language in the deeds and Covenants in this regard against the grantor who caused the ambiguity to exist. Section 70-1-516 MCA provides:

A grant is to be interpreted in favor of the grantee, except that a reservation in any grant and every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor.

Thirty feet from the center of Scenic Drive was constructed by YBP very near the east side of Tract 15, touching or within inches on the south end and within a few feet on the north end. A prospective purchaser of Tract 15 would not be able to tell if the east line of Tract 15 is within 30 feet of the center line of Scenic Drive without a Survey. As noted by the two surveyors involved in this case, the center line of this constructed road is difficult to accurately determine because the shoulders are not clearly defined. The road was constructed over twenty years ago and has obviously deteriorated. YBP did not survey the center line of the road.

Frost further contends that Scenic Drive terminates at the end of the dashed lines shown on Exhibit A-1 near the northwest corner of Tract 13. Clark contends that the road terminates at the cul-de-sac at the southwest corner of Tract 13 as constructed.

There is no dispute that the road known as Scenic Drive was actually constructed to the southwest corner of Tract 13 where it ends in a cul-de-sac near the southeast boundary of Tract 15. Exhibit 18 shows the approximate location of the road as constructed past the dashed lines ending at the south corner of Tract 13.

There was a conflict of testimony as to who built Scenic Drive from the end of the dashed or dotted lines ending in Tract 13 just past the southwest corner of Tract 12.

Dave Albert, YBP's surveyor who designed the Pipestone Tracts with building sites accessed by the road system testified that it was his understanding that YBP constructed Scenic Drive and extended the construction to the cul-de-sac to provide access to the building sites on Tract 15 and Tract 16.

Wayne Joyner stated that he expected that the road builders would terminate Scenic Drive just past the south end of Tract 12 at the end of the dashed lines in Tract 13. He stated that he was aware that Scenic Drive was constructed beyond the dashed lines to the cul-de-sac, and that he did not specifically know

whether the road was extended and constructed by the YBP road builders to the cul-de-sac.

Marilyn Frost testified that she understood that the extended road was constructed by the owner of Tract 13 because she saw his camper parked on the cul-de-sac when they were out visiting their property. She also testified at the trial that when she purchased the property, Scenic Drive was built and terminated just past Tract 12 into Tract 13. She purchased the property in September of 1987. Her testimony in this regard was in total conflict with her sworn and signed affidavit under oath dated August 11, 2008 submitted to the court as factual statements in support of her Motion for Summary Judgment. Mrs. Frost stated in her Affidavit:

*“When we purchased Tract 11, the roads did not exist on our property.”
“As promised YBP built the road in 1988” (Affidavit - Exhibit 39)*

Mrs. Frost’s testimony at trial in this regard was also contrary to the position of Frost in their contentions set forth in the Pretrial Order. Frost states in number 7 of their contentions that:

“YBP continued the driveway into Tract 13 as a convenience to the future owner. This construction was not an extension of the 60" easement, but a private driveway.”

During cross examination of Mrs. Frost by Mr McLean, Mrs. Frost indicated that when she purchased Tract 11, there was a trail down to the south

end of Tract 12 and not an improved road. Mr. Joyner testified that before the road known as Scenic Drive was constructed, there was an existing trail there already.

Resolving Mrs. Frost's conflict in testimony is important because if Scenic Drive was constructed in 1988, Wayne Joyner would not have been there to give directions as to where the road was to be constructed. Mr. Joyner testified that he left the YBP in January of 1988 and started his own Company and took the road builder with him.

It is within the province of the trial court to resolve conflicting testimony based upon its assessment of the witnesses demeanor and credibility. The court found that Mrs. Frost's sworn statements in her affidavit in regard to when the roads were built as being more credible, as it was in writing, she had more time to consider the truthfulness, and she was not subject to the pressure of testifying in court.

The court found that the Scenic Drive was constructed in 1988 by YBP and the YBP directions for its location and the extension were likely by someone else than Mr. Joyner, since he was not with YBP at that time.

In considering whether YBP constructed Scenic Drive to the cul-de-sac, the district court, after review the picture exhibits of this road and personally

examining the road, found that there were “no marks or contours on the earth which might indicate that it was constructed in two stages by two operators: the configuration of the road and its shape do not indicate a cul-de-sac in the northwest corner of Tract 13, a change in grade, a change in width, a change in slope, a change in shoulder, any difference in culverts from the others placed by YBP, or a change in borrow techniques. The consistent construction technique throughout its entire length indicate that the entirety of Scenic Drive was constructed at one time.”

The court found that it was more credible that the road was likely constructed by YBP to the cul-de-sac near the southwest corner of Tract 13.

Frost further contends that even if Clark has access over Scenic Drive, Clark cannot access their Tract 15 because their surveyor’s measurements (Matthew Mayberry) show the east boundary line of their Tract is not within 30 feet of the centerline of the constructed road at any point. Mr. Mayberry testified that although he viewed Scenic Drive, he was not present when the survey was done, did not draw the survey exhibit, but placed his stamp thereon. He testified that Frost’s survey exhibit was not the final survey and that it contained a number of mistakes. He testified that the methodology used in determining the center line was to take GPS readings by walking down the edge of the traveled way on one

side of the road and doing the same thing by walking down the traveled way on the other side of the road. However, the Frost exhibit indicates that the center line was determined by measuring from the edge of the "Gravel". The testimony and the exhibit pictures were clear that there was not gravel on the road.

Dave Albert explained in detail his methodology in locating the center line of the road. He located the shoulders by observation of the road construction and by the location of the more defined shoulders in the road and over the culvert that was installed under the road. He and his helper adjust variance in the shoulder location by lining up the shoulders where they were more obvious, including the more defined culvert shoulders. He took GPS readings at various points along the located shoulders and located center line and then platted them and the center line of the road way on the survey exhibit submitted to the Court. According to Dave Albert, his measurements show the east line of Tract 15 is within 30 feet of the centerline of Scenic Drive along the Southerly 230 feet of Scenic Drive as constructed to the southwest corner of Tract 13. Dave Albert survey - Exhibit 19.

Dave Albert's survey also shows his determination of the center line of the traveled way of the road actually being closer to Tract 15 than his shoulder measurements.

The centerline of the constructed road was not surveyed or pinned by the developer YBP. There are no clearly defined shoulders. Both surveyors' measurements are only inches different at the South end of the constructed road and only a few feet at the north end of Tract 15.

The district researched the apparent conflict of testimony between the two surveyors and the court found that "The east line of Tract 15 is within 30 feet of the centerline of scenic Drive along the Southerly 230 feet of scenic Drive as constructed to the Southwest corner of Tract 13." (Finding no. 44)

b. DID THE DISTRICT COURT ERR WHEN IT CONCLUDED SMITH AND CLARK HAVE AN EASEMENT OVER SCENIC DRIVE BECAUSE IT IS MORE REASONABLE AND CONVENIENT THAN THE EASEMENT USED BY SMITH AND CLARK AND THEIR PREDECESSORS IN INTEREST FOR OVER TWENTY YEARS?

If the Supreme Court affirms the district court's decision that Clark has an easement over Scenic Drive for access to and from their Tract 15, it is not necessary for the court to address this issue. However, Clark addresses this issue as follows. The district court found that:

"There was an ambiguity in the deeds and covenants regarding access to building sites because the determining terms are 'appropriate' (we believe he meant 'approximate') and 'as built.'"

(Conclusions of Law No. 5.)

“When the granting language is not specific and there are separate routes to a parcel of land, the Courts must look beyond the plain language of the grant to determine whether one route or the other is reasonable necessary and convenient for the purpose for which it was created with a view to the situation of the property and the surrounding circumstances. *Mason v. Garrison*, 299 MT 142, 998 P.2d 531.”

(Conclusion of Law No. 6)

“Prospector’s Loop is not reasonably convenient access to the building sites on Tract 15. Scenic Drive is the only reasonable access to the building sites on Tract 15.”

(Conclusion of Law No. 7.)

As indicated in the discussion above the district court was resolving its Conclusion of an ambiguity in the deeds and Covenants by assessing the situation of the property (Tract 15) and the surrounding circumstances, that is, the fact that there were no building sites on the west two-thirds of the property because of the steep terrain and large boulders. The history and back ground of the road system was considered. Initially, the tracts were designed with building sites and the roads were laid out to provide access to the buildings sites, Tract 15 had no building sites that could be reasonably accessed from Prospectors Loop. It was common sense and reasonable that access to these building sites on Tract 15 was intended to be over Scenic Drive.

Frost claims that the district court misquoted *Mason v. Garrison* for the proposition that if the granting language is not specific in grant of an easement, and there are separate routes to a parcel of land, the courts look beyond the plain language of the grant to determine if one route or the other is reasonably necessary for the purposes for which was created with a view to the situation of the property and surrounding circumstances.

Apparently, Frost is claiming that Clark and their predecessors abandoned their easement by non-use. Although there is no reference to any testimony as to the use of Scenic Drive by any owners of Tract 15, their claim is apparently based upon the testimony of Marilyn Frost who said she never saw any owners of Tract 15 use the road for access. There was an assumption that they used Prospectors Loop for access and the court should have looked at the historical use of the easement and determine that the owners of tract 15 acquiesced in the exclusive use of Scenic Drive by Frost.

However, since the tract was a vacant tract with no home located thereon, there was likely little use of the tract, let alone use of the road. No claim has been made of loss of the easement by adverse possession or by abandonment.

The *Mason* case involved an easement for a boat dock. The servient tenant tore down the boat dock and the dominant tenant owners apparently did not use it

for a while. The *Mason* case addresses the issue that mere non-use of an easement does not extinguish the easement as follows:

In the absence of clearly adverse use, it is elementary that mere non-use of a permanent, express easement will not lead to extinguishment by prescription. See *Halverson v. Turner* (1994), 268 Mont. 168, 175, 885 P.2d 1285, 1290. *Mason v. Garrison*, 299 Mont. 142, 153, 998 P.2d 531, 539 (Mont.,2000)

Abandonment must be proven with words or acts that indicate a clear intent to abandon. *Renner v. Nemitz*, 2001 MT 202, ¶ 30, 306 Mont. 292, 33 P.3d 255.

Mere non-use does not establish abandonment. *Id.* “Abandonment means a voluntary act involving a concurrence of act and intent.” *Harland v. Anderson Ranch Co.*, 2004 MT 132, ¶ 40, 321 Mont. 338, 92 P.3d 1160. “The act is the relinquishment of possession and the intent is a manifestation not to resume beneficial use of it. Neither of these elements alone is sufficient.” *Id.*

Leisz v. Avista Corp., 2010 WL 1858483, 2 (Mont.) (Mont.,2010)

Other authorities supporting the district court’s Conclusions of Law are set forth in the Standard of Review.

Frost also claims that the district court misquoted § 70-1-516, MCA, by stating that ambiguities caused by grants in deeds and covenants are construed in favor of the Grantee. It appears that the author of this statement failed to recognize that the district court’s decision is based upon a grant of an easement not a

reservation. Section 70-1-516, MCA, actually states:

“A grant is to be interpreted in favor of the grantee,”

Courts commonly resolve ambiguities by construing the easement document in favor of the grantee. The Law of Easements and Licences in Land, Jon W. Bruce and James W. Ely, Jr. Sec 8:2 p 8-5 to 8-6.

c. DID THE DISTRICT COURT ERR WHEN IT ALLOWED DAVE ALBERT, A SURVEYOR TO TESTIFY ABOUT SEPTIC REGULATIONS?

Frost claims that Mr. Albert, the surveyor, should not have been allowed to testify regarding basic septic tank requirements when he was testifying as to his opinion that the west two-thirds of Tract 15 did not have a building site thereon. He testified as to the regulations for the slope requirements for a septic tank drain field and the set back requirements from a stream. He stated that the slope on this part of Tract 15 would exceed the requirements for a drainfield and that the drainfield had to be at least 100 feet from a creek. Tr. pg. 158, lines 3-9.

This was objected to for lack of foundation by Ms. Griffith.

Mr. Albert was then asked if he had any familiarity with the installation of septic tanks and drainfields. He answered:

- A. Yes, I have. Since before I was registered, I have worked with engineers in septic tank design, and have done topographical work that would be used to design drainfields and septic systems, either pressure systems or gravity flow systems.

Tr. pg. 158, lines 19-25.

When asked if he was familiar with the regulations and requirement for slope for a drainfield, he stated:

- A. Yes, the slope and the distance from the open water, flowing water, is the two main ones.

Tr. pg. 159, lines 2-15.

Mr. Sweeney objected to qualification and foundation and the court overruled and directed Mr. Albert to answer the question. Mr. Albert again testified that the law limits drainfields to 15% so that the effluent won't come back out of the ground and this area is over 15%. He also testified that a drainfield must be in excess of 100 feet from a stream. Tr. pg. 159, lines 16-25; pg. 160, lines 1-4.

It was apparent that Mr. Albert was qualified to testify in regard to these basic matters.

In any event, even without the testimony as to septic tanks and drain field and distance from water courses, there was sufficient other testimony for the court to find that their was not an adequate building site on Tract 15.

d. DID THE DISTRICT COURT ERR WHEN IT CONCLUDED THAT MRS. FROST'S GATE MUST BE REMOVED?

Mrs. Frost's placement of a gate on her Tract 11 is clearly in violation of paragraph 11 of the Covenants. It is not a termination tract. Scenic Drive continues

on at least to the south side of Tract 12 and if the Court affirms the district court, Scenic Drive terminates at the southwest corner of Tract 13. Again § 70-1-516, MCA, is misquoted alleging that grants are to be interpreted in favor of the grantor, when the statute specifically states: “A grant is to be interpreted in favor of the grantee.” The district court made no error here.

APPELLANTS’ REQUEST FOR RELIEF

Therefore, the Appellees, Clark and Smith, ask that the Court find that the district court’s Findings of fact are supported by substantial evidence and are not clearly erroneous and that its conclusions of law are supported by law. Based upon these factors, Clark requests that the Court affirm the Judgment of the District Court and award Clark their costs and attorney’s fees for this appeal.

RESPECTFULLY SUBMITTED this 18th day of June, 2010.

Drysdale, McLean & Willett, PLLP

By: /s/ James A. McLean
James A. McLean
Attorney for Plaintiffs/Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a), M.R.App.P., I certify that this Appellee Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and consists of 9,378 words, excluding the covers, Table of Contents, Appendix, Table of Cases, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED this 18th day of June, 2010.

/s/ James A. McLean

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2010, a true and correct copy of the foregoing was duly served upon the following named person /___/ by personal service; /x/ by depositing a copy of the same in the United States Mail, postage prepaid, and addressed as follows:

Alanah Griffith
Pape & Griffith, P.C.
1184 N. 15th St., Ste. 104
Bozeman, MT 59715

/s/ James A. McLean